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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 356

ROBERT BURKS,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Table of Authorities Cited

Cases

	Page
Neal v. State, 55 A.C. 11, 19 Cal. Reptr. 607	4
People v. Bridgehouse, 47 Cal. 2d 406, 303 P. 2d 1018	5
People v. Holt, 25 Cal. 2d 59, 153 P. 2d 21	5
People v. Howard, 211 Cal. 322, 295 P. 333	5
People v. Kelly, 208 Cal. 387, 263 P. 226	5
People v. Moreno, 6 Cal. 2d 480, 58 P. 2d 629	5
People v. Slater, 60 Cal. App. 2d 353, 140 P. 2d 846	5
People v. Tubby, 34 Cal. 2d 72, 207 P. 2d 51	5
Williams v. Kaiser, 323 U.S. 471	4

Codes

California Penal Code:	
Section 654	4
Section 664	4

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I. On page 6 of its Opposition to Petition for Certiorari Respondent says:

> "Throughout the petition, it is asserted that the District Court of Appeal agreed with petitioner's contention that the evidence did not support a conviction of murder in the first degree. As a matter of record, however, the District Court of Appeal considered petitioner's argument relating to the asserted insufficiency of the evidence and summarily rejected it, stating, 'the evidence does not require a conclusion in accord with appel-

lant's views' (189 ACA at 331, 11 Cal. Reptr. at 201)"

First, we asserted that *for purposes of argument* the District Court of Appeal assumed that the evidence does not show murder of the first degree. See Petition for Writ of Certiorari, pp. 3, 5 (italics), 7 (italics).

Second, a reading of the opinion (Appendix A to the Petition for Certiorari) will show that the above quoted language was directed to the petition for a writ of *coram nobis,* seeking a *complete exoneration* of petitioner, *not to the motion for reduction of sentence.* The language of the District Court of Appeal to which respondent refers may be found at page ii of Appendix A to the Petition and reads as follows:

> (App. A, p. ii) "The appellant's first contention is that the evidence was insufficient as a matter of law to show willful, deliberate and premeditated intent to kill required to sustain a finding of first degree murder. *His argument is that the evidence actually showed he was engaged in defending himself. The evidence does not require a conclusion in accord with appellant's views,* but more important, it is clear that this contention raises an issue of law which could have been dealt with on appeal. Hence the writ of error *coram nobis* cannot issue." (English italics added.)

Then the District Court of Appeal says:

> (App. A, p. iii) "The foregoing matters were presented in briefs which the appellant filed in propria persona. At the time for oral argument, counsel appeared on behalf of appellant, and asked for time to review the case and to make

> such arguments as might be warranted. Time was granted and briefs have been filed, so we now consider the points thus presented.
>
> "Counsel points to that portion of appellant's application which carries the designation, 'Motion for Reduction of Sentence' and contends that under such a pleading appellant can at this time and stage of the proceeding question the sufficiency of the evidence."

This evidently refers to something other than the language quoted from page ii of Appendix "A" (supra)—which deals with the *complete exoneration* of the appellant. At Petition for Writ of Certiorari, pages 1-2, we expressly state that the Petition for Certiorari is limited to "review the latter court's affirmance of an order of the said Superior Court *denying defendant-petitioner's motion to reduce the judgment to something less than murder of the first degree*, on the ground that, as a matter of law under California law, the evidence did not show murder of the first degree, i.e., did not show the crime for which defendant-petitioner was adjudged guilty and imprisoned, but showed a different and lesser crime, if any."

At Appendix E, page xiv of the Appendix to the Petition for Certiorari, counsel for petitioner stated expressly that in their view, "the motion for Reduction of Sentence presents the substantial issues of the appeal".

This shows that the Petition for Certiorari deals wholly and solely with the motion for reduction of sentence. The other motion before the California

courts (the petition for a writ of error *coram nobis*) seeking a complete exoneration has not been made a subject of the present petition for certiorari. Yet the language quoted at page 6 of Respondent's Opposition to Petition for Certiorari refers solely to this other petition for a writ of error *coram nobis,* which claimed complete exoneration in the state court and *which has not been brought before the United States Supreme Court.*

II. On page 8 of the Respondent's Opposition to Petition for Writ of Certiorari, the Attorney General of the State of California says that *habeas corpus* is available to the petitioner as a post-conviction remedy. It needs only to be said that the District Court of Appeal to which this petition is directed, *does not say this.* (Pet. Cert. App. "A".)

Neal v. State, 55 A.C. 11, 17, 19 Cal. Reptr. 607 (Resp. Opposition, p. 11) holds that *habeas corpus* is a proper remedy to review the question as to whether Cal. Pen. Code Sec. 654 governs the question of multiple punishments, and whether there has been a misinterpretation of Cal. Pen. Code 664. At that, the Writ of Habeas Corpus was denied.

Williams v. Kaiser, 323 U.S. 471 (Resp. Opp. pp. 7, 8) held in favor of the prisoner so far as right to counsel was concerned. It does not hold the Petition for Certiorari to be premature.

III. On pages 3-5 of Respondent's Opposition, and again at pages 6, 7, the Attorney General of the State of California argues the merits of the question whether the record contains evidence supporting a

conviction of murder of the first degree, or only of some lesser offense. As we have already said, *the District Court of Appeal does not examine this question.* (Pet. for Cert., App. "A", pp. iii-v.)

It need only be said here that appellant discussed this question in the state court referring to the evidence (which has not been brought up, but which can be brought up if the court wishes), and citing the following California cases:

People v. Bridgehouse, 47 Cal. 2d 406, 303 P. 2d 1018;

People v. Holt, 25 Cal. 2d 59, 153 P. 2d 21;

People v. Howard, 211 Cal. 322, 295 P. 333;

People v. Kelly, 208 Cal. 387, 263 P. 226;

People v. Moreno, 6 Cal. 2d 480, 58 P. 2d 629;

People v. Slater, 60 Cal. App. 2d 353, 140 P. 2d 846;

People v. Tubby, 34 Cal. 2d 72, 207 P. 2d 51.

Especial emphasis was placed on *People v. Holt,* 25 Cal. 2d 59, 153 P. 2d 21.

But the District Court of Appeal does not discuss this question at all.

We submit that the Attorney General cannot avoid certiorari by arguing a question which the District Court of Appeal simply did not discuss.

Dated, San Francisco, California,
October 2, 1961.

Respectfully submitted,

GEORGE OLSHAUSEN,
Attorney for Petitioner.